

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

HILTON INN
MEARS HOTEL COMPANY, DBA
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-64
Case No. T-68-58

Employer Account No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from Referee's Decision No. S-T-1517 which granted the petitioner's request to cancel a transfer of reserve account. Written argument was filed by the petitioner and the Department.

STATEMENT OF FACTS

On September 16, 1965 the petitioner acquired the hotel business of Del E. Webb's Mission Bay Hotel Company, a sole California corporation, Employer Account No. 157-0175. The petitioner had not previously conducted any business operations in California. It duly registered with the Department as a new employer and was assigned account number 176-7494.

In accordance with established procedure, as the petitioner's registration indicated the acquisition of a business, the Department mailed to the petitioner a form entitled "Application for Transfer of Reserve Account." The first paragraph of this form reads as follows:

"INSTRUCTIONS--Please read and complete this form carefully. If you took over a business from an employer who was registered with the Department of Employment, you may apply for transfer of all or a part of his reserve account. (A reserve account is used to determine employer tax rates. Not all reserve account balances are desirable. In some the insurance charges have exceeded the tax paid resulting in a minus reserve balance.) If the former owner has a minus reserve balance this form will be returned to you without transfer for further consideration."

The form also prominently featured the statement:

"YOU HAVE 90 DAYS AFTER ACQUIRING THE BUSINESS TO FILE THIS APPLICATION. Beyond this period of time any application for transfer may have to be denied or restricted."

This form was received by the petitioner's auditor who was newly arrived in California. He had extensive hotel accounting experience and was generally aware of reserve account and merit rating provisions under employment insurance laws in other states. However, he was not familiar with matters arising under the California Unemployment Insurance Code. On November 20, 1965 the auditor completed the transfer application, signed it and returned the form to the Department. Above his signature was the printed notation:

"SIGN AND DATE: I/we hereby make application for transfer of reserve account and certify that the above information is correct to the best of our knowledge and belief."

In conformity with section 1052 of the code, the Department on December 6, 1965 processed the petitioner's application for a complete reserve account transfer and notified the petitioner that account number 157-0175 had

been transferred to its account. The "Notice of Reserve Account Transfer" showed the reserve balance being transferred as \$7,536.91 and the employer's contribution rate for the period from September 16 to December 31, 1965 as 3.2 percent.

Thereafter, a firm specializing in handling unemployment insurance matters for employers was engaged by the petitioner. This firm determined that during the period from July 1, 1964 through June 30, 1965 benefit charges to the transferred reserve account exceeded employer contributions during such period so that the reserve account balance as of June 30, 1965 was \$2,345.67. On June 4, 1966 a petition was filed to a referee requesting that the transfer of the predecessor employer's reserve account be cancelled.

It is contended by the petitioner that the Department should have noted the adverse reserve account experience between July 1, 1964 and June 30, 1965 and should have called this factor to the employer's attention prior to processing its application for transfer. The petitioner further contends that the petitioner's auditor was inexperienced in reserve account transfer matters and he could not properly make a judgment whether to request transfer of reserve account until he received further information from the Department.

It is contended by the Department, citing documentation of legislative committee actions, that a 1955 amendment to section 1055 of the California Unemployment Insurance Code was intended only to provide relief by petition to a predecessor which felt that its reserve account had been improperly transferred, in whole or in part, to a successor. It further contends that there is no statutory authorization for any petition by a recipient of a reserve account transfer, since the statute requires that upon receipt of an application for transfer the appropriate transfer "shall" be accomplished. In rebuttal the petitioner states that the Department is inconsistent in this position in that the Application for Transfer states that a negative reserve balance will not be transferred without affording the applicant an opportunity for further consideration.

The documentary evidence introduced at the hearing before the referee shows that the petitioner suffered an 0.2 percent disadvantage in its balancing tax rate for the calendar year 1967.

REASONS FOR DECISION

Section 1051 of the Unemployment Insurance Code provides that an application for transfer of reserve account may be made by an employing unit that takes over the organization, trade, or business of any employer. Section 1052 of the code provides in part:

"1052. Upon receipt of the application the separate account, actual contribution and benefit experience and payrolls of the predecessor or that part thereof, as determined by authorized regulations, which pertains to the organization, trade, or business, or portion thereof acquired, shall be transferred to the successor employer for the purpose of determining its rate of contribution after such acquisition with the same effect for such purpose as if the operations of the predecessor had at all times been carried on by the successor. . . ."

Section 1055 of the code, as amended in 1955, reads in part as follows:

"1055. (a) In the event of a denial or granting of an application for transfer of reserve account, the director shall give notice to the employing unit making such application, and to the predecessor employing unit to whose reserve account the application relates, if such predecessor employing unit has continued in business as an employer. . . . Within 30 days after service of notice of denial or granting of transfer of reserve account any employing unit affected may file with a referee a petition for review. . . ."

Prior to 1954, section 1055 of the code stated in part:

"1055. In event of a denial of an application for transfer of reserve account, any interested party may petition for hearing before the Appeals Board"

An amendment to the statute in 1954 provided that the petition for such a hearing would be directed to a referee rather than to the Appeals Board.

The Department argues that section 1055 of the code does not allow a successor employer to petition for review of a transfer of reserve account. It urges that the 1955 amendment to code section 1055 was only intended to provide the means by which a predecessor employing unit could petition for review when its reserve account was transferred to someone else improperly. We do not agree with the Department in this respect. Notwithstanding the intent of the legislature in amending section 1055, we must follow certain rules in construing statutes.

In United States v. Goldenberg, 168 U.S. 95, 18 S. Ct. 3, the court held that the legislature must be presumed to know the meaning of words used in the enactment of a statute. In the case of Merriell v. Preston (1883), 135 Mass. 451, 455, Justice Holmes stated:

" . . . There is a strong presumption in favor of giving words their natural meaning and against reading them as if they said something else"

A change of legislative purpose or intent will be inferred from an amendment materially changing the wording of a statute. (Lundquist v. Lundstrom, 94 C.A. 109, 270 P. 696; Hoffman v. McNamara, 102 C.A. 280, 282 P. 990; Gallichotte v. California Mutual Bldg. & Loan Assoc., 23 C.A. 2d 570, 74 P. 2d 73, 535; Hammond v.

McDonald, 49 C.A. 2d 671, 122 P. 2d 232) Any essential change in the phraseology of a statutory provision will be taken as an indication of a change in the meaning rather than as an interpretation. (McGregor v. Burlingame, 159 C. 441, 114 P. 566; Young v. Three for One Oil Royalties, 1 C. 2d 639, 36 P. 2d 1065; Todd Estate, 17 C. 2d 270, 109 P. 2d 213)

Following the law as expressed by the courts regarding construction of statutes, we stated as follows in Benefit Decisions Nos. 6610 and 6612:

"The cardinal rule in the construction of statutes is to follow the legislative intent and that intent must be determined from the express language of the statute so far as possible. Where the meaning of the language of the statute is free from ambiguity, the intention of the legislature must be determined from that language, and it cannot be rewritten through interpretation to conform to a presumed intention which is not expressed, however desirable such a result might appear to be and even though the consequences of applying the express language would be to defeat the object of the statute"

In applying the rules of statutory construction to the present matter, it is our opinion the legislature, by the clear and unambiguous wording of section 1055, intended to allow either a predecessor or a successor employer to petition for a hearing before a referee. There are readily discernible situations in which a successor employer should be entitled to relief.

In Tax Decisions Nos. 1759 and 1909, which were decided prior to the 1955 amendment to section 1055, we held that the granting of a transfer of a reserve account was not appealable. However, in those cases, we did allow a petition for review by the successor employer on the theory that its appeal was from a statement of account and contribution rate. In effect,

we reviewed whether there had been a proper transfer of reserve account. Under the present wording of section 1055, such a theory of review of the statement of account and contribution rate is unnecessary.

The next question in issue in this matter is whether the transfer of a reserve account may be set aside.

The wording of section 1052 of the code specifies that the reserve account "shall be transferred." Section 15 of the code states that "shall" is mandatory and "may" is permissive. In 23 Ops. Cal. Atty. Gen. 68 the Attorney General stated:

" . . . 'Shall' is ordinarily a word of mandatory meaning . . . although it may be deemed directory if the provisions of the statute, properly construed, appear to require it"

Under the wording of section 1052, it is clear that it is mandatory on the Department to transfer a reserve account when such transfer meets the test of being a proper transfer. Even though the Department's application for transfer forms advise an employer that "if the former owner has a minus reserve balance, this form will be returned . . . for further consideration," the Department must still effect the transfer unless such transfer is withdrawn by the applicant. The further issue presented is what relief may be had by the petitioner on its petition for review.

Generally, an administrative agency must apply applicable statutes and laws within the boundaries so circumscribed by such statutes. As a general rule, we are confined to following policies and standards set forth in applicable statutes. In Edwards v. United States, 91 Fed. 2d 767, the court stated:

"Congress may enact a general statute setting up definite standard of action, leaving to administrative official or board

task of prescribing or interdicting particular courses of action within field covered by statute, and confining administrative discretion to effectuating clearly and definitely expressed policies and standards in statutes."

In California Employment Stabilization Commission v. Payne, 187 P. 2d 703, 31 C. 2d 210, 215, the court held:

" . . . The commission was created by, and derives its powers from, the Legislature, and it does not have rights which are superior to legislative will. . . ."

In addition the California Supreme Court stated in a recent case:

"An administrative agency may not exercise its sublegislative power to modify, alter or enlarge provisions of the legislative act which is being administered." (Ralphs Grocery Co. v. Reimel, 70 Cal. Rptr. 407, 444 P. 2d 79)

In Tax Decision No. 2280, a case where the Department found it had made an error in transferring a reserve account, we held that the Department acted within its administrative capacity in retroactively denying the transfer. The Department had a duty to correct its prior action when the error was discovered. Likewise, we may set aside a reserve account transfer if any error was made. In Tax Decision No. 2321, we held that where the Department had made an error in computation, the successor employer, although having applied for the transfer of reserve account, should not be burdened with the negative accumulation of experience if it had relied on advice by the Department in making its decision to apply for a transfer of reserve account to its detriment. In effect, an estoppel would lie in such case.

Estoppels are not favored in the law and the doctrine is applicable only where it is established by clear and substantial evidence that equity between the parties demands that one of the parties be estopped to deny previous declaration or conduct upon which another party has relied and acted in good faith to the latter's detriment.

In the instant case, the evidence does not show the petitioner applied for transfer of reserve account relying on any information furnished it by the Department. Therefore, the transfer may not be set aside on an estoppel basis.

The most pressing question herein is whether the statutes involved can be interpreted in such manner that the transfer of reserve account once completed may be set aside on any basis except estoppel, misrepresentation, or errors made in computation by the Department.

In cases arising under benefit and disability claims involving requests for backdating or cancellation of claims filed with the Department, we have held that there is no authority in the code for cancellation of a valid claim once established, unless equity requires such cancellation.

In the instant case, although the petitioner's auditor was unfamiliar with reserve account transfer under the California Unemployment Insurance Code, sufficient information was furnished on the form which was sent to the employer by the Department to clearly point out that once the form was completed, a transfer of reserve account would be made. Further, it was not mandatory for the petitioner's auditor to complete the application for reserve account transfer. Since he had worked in the area and was somewhat familiar with reserve account and merit rating systems, he could well have requested information from the Department before applying for the transfer. The petitioner elected to apply for the reserve account transfer. It made its selection and ran the risk of having an account transferred which would be disadvantageous. In our opinion the reasoning in the disability and

benefit decisions is applicable to the facts in this case. When transfer of the reserve account was requested by the petitioner, the Department was bound to effect such transfer. The petitioner is bound by its election unless equitable principles of law require the transfer be set aside.

At the time the transfer was made, there was a positive balance in the predecessor's reserve account. The Department was under no duty to inform the petitioner that charges were pending against the account. The facts show the petitioner acquired a positive balance at the time of the transfer.

As we have stated above, we are limited in the relief which can be afforded the petitioner. We can only go so far as to correct any errors made by the Department at the time of the transfer. The record shows the Department acted on the petitioner's application, there were no errors in computation, and no misinformation was furnished to the petitioner on which it relied to its detriment. Although the Department as a matter of policy advises successor employers that, "If the former owner has a minus reserve balance this form will be returned to you without transfer for further consideration," the question of the propriety of the Department in giving successor employers such "a break" is not before us. The petitioner was entitled to have its reserve account transferred. We conclude the transfer of reserve account was proper and therefore the petition for review is denied.

DECISION

The decision of the referee is reversed. The petition for review is denied. The transfer of Employer Account No. 157-0175 to the petitioner shall stand.

Sacramento, California, December 30, 1969

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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